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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DOUGLAS RICHARD WYNN, Defendant and Appellant.	G033141 (Super. Ct. No. 01HF1221) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Daniel J. Didier, Judge. Affirmed in part and reversed in part.

Christine Vento, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lilia E. Garcia and Janelle Boustany, Deputy Attorneys General, for Plaintiff and Respondent.

Douglas Richard Wynn stands convicted of multiple felonies. He contends he was wrongly convicted of acquiring an access card with fraudulent intent, and the court erred in failing to give a cautionary instruction regarding evidence of his prior convictions. We agree with the first contention, but not the second. Therefore, we reverse the conviction for acquiring an access card with fraudulent intent and affirm the judgment in all other respects.

* * *

Elizabeth Ryan was giving a presentation at a Los Angeles hotel when someone at the hotel made off with her purse. The next day, Wynn used one of her credit cards to buy some clothes at South Coast Plaza. He tried to exchange the clothing two days later, but the clerk discovered he was using a stolen credit card. At that point, Wynn quickly left the store. When confronted outside, he fled the scene and led police on a high-speed chase before crashing his vehicle. The police found a handgun and several items belonging to Ryan, including a check and credit cards, in Wynn's possession.

Wynn testified he acquired the stolen property from a woman he met at a bar. According to Wynn, the woman introduced herself as Elizabeth Ryan and asked him to cash one of her checks for her. She also accompanied Wynn to South Coast Plaza the following day and let him use her credit card to buy some clothes. Eventually, Wynn discovered his new friend was not Elizabeth Ryan. He then returned to Saks in an attempt to sort everything out, but he got cold feet and left the store. He claimed he fled the police because he was a felon and panicked over the situation. On cross-examination, he admitted he had been convicted of credit card fraud and other theft-related crimes.

The jury found Wynn guilty of two counts of burglary and one count each of acquiring an access card with the intent to defraud, fraudulently using an access card, receiving stolen property, check fraud, recklessly evading the police and possessing a firearm as a felon. The court found Wynn had suffered two prior strike convictions and sentenced him to 25 years to life in prison.

I

Wynn argues his conviction for acquiring access card information with the intent to defraud must be reversed because, as charged, that crime was a lesser included offense of fraudulent use of an access card. The Attorney General agrees, and so do we.

A defendant cannot be convicted of both a greater offense and lesser included one. (*People v. Ortega* (1998) 19 Cal.4th 686, 692.) For purposes of this rule, "'"a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser."' [Citation.]" (*People v. Sanchez* (2001) 24 Cal.4th 983, 987-988.)

Count 2 of the information charged Wynn with acquiring an access card with the intent to use it fraudulently within the meaning of Penal Code section 484e. Count 3 alleged Wynn violated Penal Code section 484g in that he "did willfully, unlawfully and with the intent to defraud, use an access card obtained and retained in violation of Penal Code Section 484e for the purpose of obtaining money, goods, services and anything else of value."

It is clear the facts alleged in count 3 include all the elements of the lesser offense contained in count 2. Indeed, count 3 specifically refers to the lesser offense in describing how Wynn fraudulently used an access card. Under these circumstances, his conviction for the lesser offense must be reversed.

II

Wynn also contends the court erred in failing to give a sua sponte instruction regarding the use of his prior convictions. Specifically, he maintains the court should have instructed the jurors not to use the prior convictions "to find that [he] had a disposition to commit the crimes charged." (See CALJIC No. 2.50.)

Generally, the court is under no obligation to give such an instruction. (*People v. Collie* (1981) 30 Cal.3d 43, 64.) The obligation arises only in the "occasional extraordinary case" where the evidence of prior misconduct plays "a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose." (*Ibid*.)

This was not such a case. The presentation of evidence regarding Wynn's prior convictions was relatively brief, and because the priors involved dishonesty they were quite relevant to Wynn's credibility on the witness stand. As our Supreme Court has stated, "'[A]cts of deceit, fraud, cheating, or stealing . . . are universally regarded as conduct which reflects adversely on a man's honesty . . . .'" (*People v. Beagle* (1972) 6 Cal.3d 441, 453.) Moreover, even before the prosecutor brought up the priors, Wynn had testified he was a convicted felon. Given all of this, the information concerning the priors cannot be said to have been highly prejudicial. Therefore, the court did not have a sua sponte duty to give the subject instruction.

Wynn contends his attorney was ineffective for failing to request CALJIC No. 2.50. However, there is nothing in the record to suggest the jury used Wynn's prior convictions as improper propensity evidence. Indeed, the court specifically instructed the jurors that "[t]he fact that a witness has been convicted of a felony may be considered by you only for the purpose of determining the believability of that witness." (See CALJIC No. 2.23.) Given the state of the record, we presume the jury followed this instruction and did not misuse Wynn's priors. (*People v. Danielson* (1992) 3 Cal.4th 691, 722 [absent indications to the contrary, it is presumed the jury followed the trial court's instructions].) Therefore, defense counsel's failure to request CALJIC No. 2.50 was not prejudicial. (See *Strickland v. Washington* (1984) 466 U.S. 668 [claimant alleging ineffective assistance of counsel must prove he would have obtained a more favorable result absent counsel's alleged failings].) No Sixth Amendment violation has been shown.

DISPOSITION

Wynn's conviction for acquiring an access card with the intent to defraud (count 2) is reversed, as is his sentence on that count, which was stayed. In all other respects, the judgment is affirmed.

BEDSWORTH, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.